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No. 79-678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAN DIEGO GAS & ELECTRIC CO.,
Appellant,

v.

CITY OF SAN DIEGO, *et al.*,
Appellees.

On Appeal from the Court of Appeal of the State of California

BRIEF OF THE CONSERVATION FOUNDATION, DON'T TEAR IT DOWN, NATIONAL AUDUBON SOCIETY, NATIONAL CENTER FOR PRESERVATION LAW, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS AND SIERRA CLUB AS AMICI CURIAE IN SUPPORT OF APPELLEES

DAVID BONDERMAN
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

CHRISTOPHER J. DUERKSEN
THE CONSERVATION FOUNDATION
1717 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae

Of Counsel:

MICHAEL MANTELL
Washington, D.C.

ANTONIO ROSSMANN
San Francisco, Calif.

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QUESTIONS PRESENTED

1. Whether, on the present procedural posture of the case where the California Court of Appeal has reversed the trial court's decision, determined that Appellant has not examined its administrative remedies, and concluded that the trial judge failed to consider important factual issues, the present case is appropriate for review by this Court?

2. Whether Appellant has shown that the adoption of an "open space" plan and the rezoning of a small portion of its property to prohibit general industrial uses amounts to a "taking," where Appellant purchased the property for a power plant and that use is not precluded; Appellant included the property in its rate base and obtained a rate of return as a utility on the property after the property was supposedly "taken;" and Appellant made no attempt to show the impact of the rezoning on its entire property but has already recovered nearly as much as it originally paid for the property?[1]

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[1] Amici believe that an analysis of these issues makes it plain that no "taking" has occurred, so that consideration of the remaining issue—whether a damage remedy is constitutionally required where a land use regulation unduly burdens private property—is unnecessary. In the event, however, that the Court does reach that issue, Amici fully support the position of Amici Curiae National Trust for Historic Preservation *et al.* as set out in their brief.

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American Law Institute, *A Model Land Development Code: Complete Text and Reporter's Commentary* (1975) 27

A Plan for the Preservation of Natural Parks for San Diego, City of San Diego General Plan (April 1973) 11

California Coastal Commission, Revised Draft Working Paper—Los Penasquitos Lagoon (1978) 2

California Department of Fish and Game, The Natural Resources of Los Penasquitos Lagoon and Recommendations for Use and Development, Coastal Wetlands Services #7 (April 1974) 2, 4

City of San Diego, Progress Guide and General Plan (1979) 2

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 42(2), the above listed organizations file this brief as Amici Curiae in support of Appellees. Letters of consent from counsel for the parties have been filed with the Clerk.

Amici are organizations concerned with the protection and promotion of the natural and built environment and with land use regulation and planning. All Amici have a major interest in the encouragement of environmentally and economically sound land use policies and are seriously concerned by the implications for environmental, historic preservation and land use regulations unless this Court

sustains the decision below. A more detailed description of each Amicus appears in Appendix A to this brief.

STATEMENT OF THE CASE

Appellant's claim that its property has been unconstitutionally burdened ignores the factual context and miscomprehends the procedural status of the case. Amici believe it is useful for a full understanding of Appellant's claims to set forth this background.[2]

1. *The Los Penasquitos Lagoon.*[3] Los Penasquitos Canyon is the last major ecologically intact riverine woodland in San Diego. At its narrow ocean outlet lies Los Penasquitos Lagoon, a 385-acre marsh complex consisting of mud flats, salt flats and tidal and nontidal salt marsh, with occasional deep channels. Much of the marsh is under water and all of it is within the floodplain onto which drain the waters of the Los Penasquitos and Soledad Canyons. The lagoon is among the few such areas left in Southern California and has substantial ecological importance as a feeding and resting area for shore birds and as a spawning and nursery ground for fish and shellfish.

A picture of the Los Penasquitos Lagoon appears at page 4. As can be seen from the picture, with the exception of the U.S. 101 bridge built in 1932 and the Santa Fe Railroad tracks, the lagoon area is entirely undeveloped. The portion of the lagoon west of the tracks is owned almost entirely by the State of California; the portion east of

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[2] California courts take judicial notice of laws, ordinances, public documents, and other similar matters of record. *See, e.g., Dale* v. *City of Mountain View*, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976). The California Evidence Code gives great latitude to courts in this regard. *See* Cal. Evidence Code §§ 452-53.

[3] The description of the Los Penasquitos Lagoon is based upon California Department of Fish and Game, The Natural Resources of Los Penasquitos Lagoon and Recommendations for Use and Development, Coastal Wetlands Series #7 (April 1974); California Coastal Commission, Revised Draft Working Paper—Los Penasquitos Lagoon (1978); and City of San Diego, Progress Guide and General Plan 120, 124-26 (1979).

the tracks is owned by Appellant and is the subject of this litigation. Appellant's assertion that the surrounding area is primarily industrial (App. Br. at 28) is inaccurate. As the photograph and map at pages 4-5 show, to the east is a large undeveloped area and to the north and northwest are single family residential developments. The Torrey Pines State Reserve adjoins the property on the west, and there is a light industrial park to the south.

2. *Appellant's acquisition and treatment of its property.* In 1966 Appellant acquired approximately 412 contiguous acres of property from a number of sellers for a total of around $3.5 million. The purchases included approximately 206 acres within the Los Penasquitos Lagoon which are contested here.[4]

At the time of its purchase, Appellant consistently indicated that it assembled the 412 acres as a single tract for

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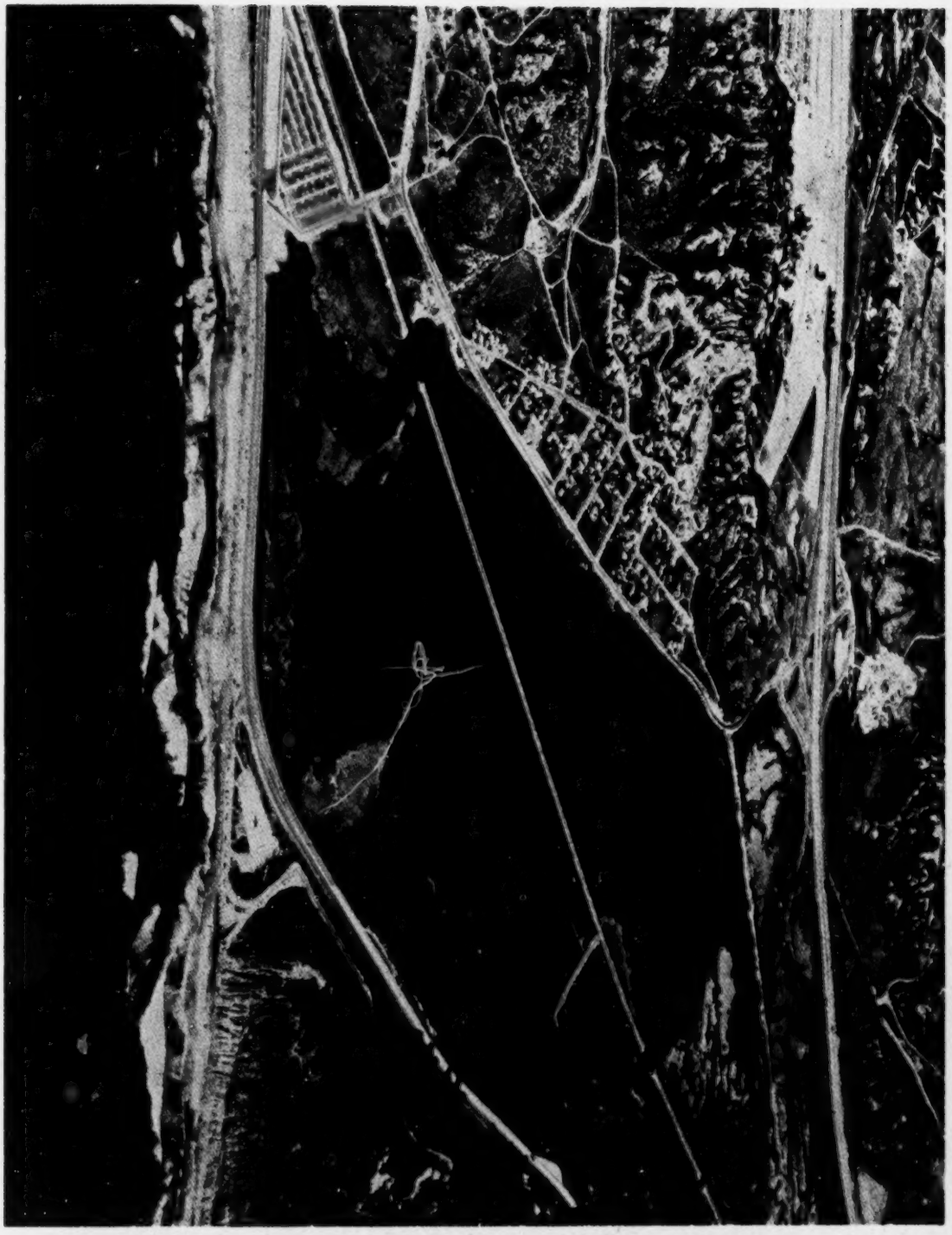
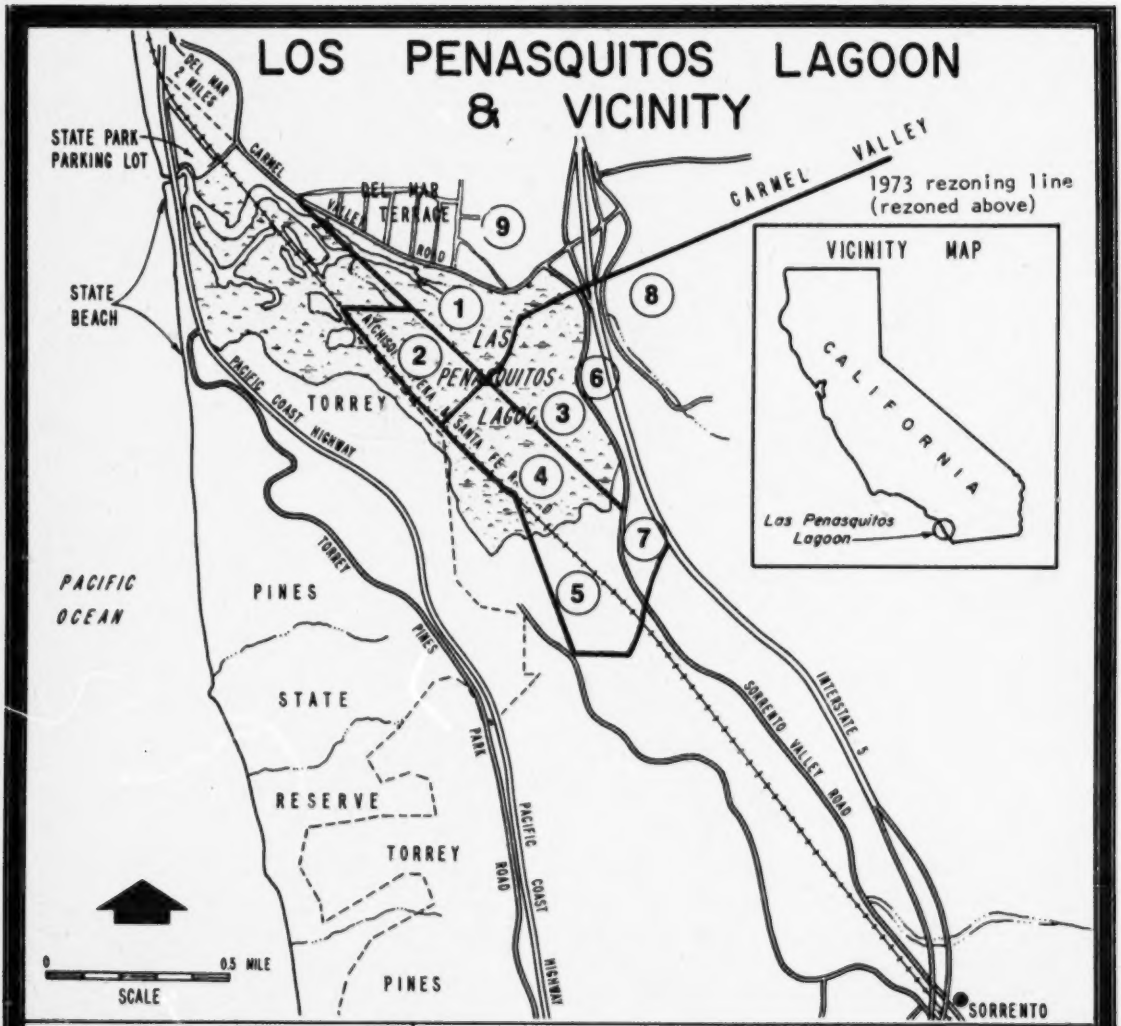
[4] Amici have generally used the acreage and dollar figures contained in Appellant's brief (App. Br. at 5), although those figures cannot be confirmed by a detailed examination of the trial record. Indeed, the record shows that during the trial the parties referred to identical portions of the property by different designations at different times (*compare* the reference to parcel B-2 on Plaintiff's Exhibit 1-B at T 137 *with* a reference to the same parcel as R-2 on Plaintiff's Exhibit 30 at T 448-49) and at other times used the same designation to refer to different parcels (*compare* the two uses of B-1 to designate different parcels on different exhibits at T 316). To make matters worse, Appellant's interrogatory answers contain different acreages (*see* Answer to Defendants' Interrogatory 1, which asserts that the subject property, aside from the land acquired from the City of San Diego, totals 232.78 acres) from its trial claims (*see* J.A. 5, 16-20, at which Appellant claimed a taking of only 165.90 acres) and Appellant's filings with the California Public Utilities Commission contain still another set of figures. *See* California Public Utilities Commission, *Application 55627 et seq.* (*San Diego Gas & Electric Co.*), testimony of John P. Hughes, Exhibit 121, pp. 1-8, 1-9 (Feb. 23, 1976). The purchase price of the entire tract is reported as $3.7 million in Mr. Hughes' testimony, *supra*, at page 1-9, and as $3.5 million in Appellant's property account file at the California Public Utilities Commission. See n.7, *infra*.



Photograph from California Department of Fish and Game, The Natural Resources of Los Penasquitos Lagoon, Recommendations for Use and Development, Coastal Wetlands Series #7 (April 1974).



SDG & E
Sorrento Valley Property

Plate from: California Dept. of Fish and Game, The Natural Resources of Los Penasquitos Lagoon, 1974.

(NOTE: all acreages and delineations are approximate only)

Subject Property	Approx. Acreage	Zoning Before 1973	Zoning After 1973	Open Space Designation
1	63	A-1-1*	A-1-10	yes
2	38	M-1-A	A-1-10	yes
3	48	A-1-1	A-1-1**	yes
4	66	M-1-A	M-1-A	yes
5	12	M-1-A	M-1-A	no
6	8***	A-1-1	A-1-1	no
7	11	M-1-A(LC)	M-1-A(LC)	no
Contiguous Parcels				
8	126	A-1-1	A-1-1	no
9	40	R-1-5	R-1-5	no

* Small section was zoned R-1-5.
** Stipulated for possible future industrial use.
*** 3.6 acres subject of 60 year lease.

one purpose only—use as a future power plant site. Indeed, a portion of the property was acquired from Appellee City of San Diego on Appellant's specific representation that it would use the site only as a power plant and that the "development of the cooling water facilities [for the power plant] could restore and save major portions of the slough (Los Penasquitos Lagoon) as a fish and wildlife haven." [5] Appellant admitted in the trial court and states in its brief here that it purchased the property for a power plant. (App. Br. at 5).[6]

Appellant made similar representations to the California Public Utilities Commission ("PUC") which has general regulatory authority over Appellant. Beginning in 1966, the year of the acquisition, Appellant reported to the PUC that the 412 acres were an "electric plant [site] held for future use" and thus the entire $3.5 million in property acquisition costs should be included in Appellant's rate base.[7] Under the relevant California law, Appellant as a

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[5] Submission of F.W. Devore, Appellant's Manager of the Engineering Land Department, to City of San Diego Planning Commission at 2-3 (October 10, 1972).

[6] In a few places in its Brief (*e.g.*, at page 26), Appellant suggests that it actually intended to use the property for general "industrial" purposes and cites the trial judge's now reversed Finding 3 as support for that claim. Finding 3 (J.A. 36), however, does not refer to any proposed general industrial use, and there is nothing in the record to support a finding that Appellant ever intended to use the property for anything but a power plant. For example, in the trial court Appellant listed the reasons for its acquisition of the property as "the possible future construction of [a] power plant on the subject property as part of a long range electrical generation resource planning . . . ." Answer to Defendants' Interrogatory 1(e).

[7] Pursuant to Cal. Public Utilities Code §§ 792-93, the California PUC and its predecessor adopted the uniform system of accounts for utilities set forth in 18 C.F.R. Part 101. *See* 48 C.P.U.C. 253 (1948), 40 C.R.C. 777 (1937). Under this system "account 105" is used for future utility sites and included in the rate base. 18 C.F.R. Part 101, Electric Plant Instructions, § 5B(1) at 301. All

regulated utility had its rates set by the PUC at a level designed to afford Appellant a PUC-estimated rate of return which varied between 8.00% and 8.75% on its rate base.[8] Accordingly, continuing long after the present lawsuit was brought, Appellant received from its customers a state-authorized profit on the 412 acres. The estimated return on Appellant's investment ultimately totalled some $1,483,140,[9] more than forty percent of Appellant's total original outlay for the property.

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412 acres were included in this account. *See* California PUC, *Application 55627 et seq.* (*San Diego Gas & Electric Co.*), testimony of John P. Hughes, Exhibit 121, pp. 1-8, 1-9 (Feb. 23, 1976).

[8] Cal. Public Utilities Code § 739 empowers the Public Utilities Commission to establish a rate of return for utilities and the PUC has done so from time to time. The PUC then sets the authorized charges for each utility so as to generate sufficient revenue to attempt to provide the PUC-estimated rate of return. During the period relevant to Appellant's claims in this case, the PUC rates of return have been as follows: September 30, 1972-November 8, 1974—8.0% (74 C.P.U.C. 93, 105 (1972)); November 9, 1974-July 29, 1977—8.75% (77 C.P.U.C. 495, 500 (1974)). *See* San Diego Gas & Electric Company, 1976 Annual Report, p. 27.

[9] This figure is derived by (i) multiplying the PUC-estimated annual rate of return as described in the proceeding note (or a prorated fraction thereof, where the rate involved was in effect for less than a full calendar year) times the $3.5 million property cost Appellant included in its rate base for each period from September 30, 1972 until July 29, 1977 and (ii) totalling the revenue for the various periods to obtain an overall figure. This period was used because, although the property was added to Appellant's rate base in 1966, the PUC apparently did not consider the new rate base until its next rate proceeding which took effect on September 30, 1972. In 1976, two years after the present lawsuit was filed, the California PUC required Appellant to delete the property from its rate here, apparently on the theory that Appellant no longer intended to use the property as a plant site. *See* California Public Utilities Commission, *Applications Nos. 55627 et seq.* (*San Diego Gas & Electric Co.*), testimony of John P. Hughes, Exhibit 121, pp. 1-9 (February 23, 1976). However, the PUC apparently did not consider this new rate base until its next rate proceeding, which was approved July 29, 1977. Thus, for rate purposes the 412 acres were considered by the PUC as part of the rate base between September 30, 1972 and July 29, 1977.

3. *Zoning and use of Appellant's property.* As previously noted, Appellant acquired its approximately 412 acres in 1966. Some 206 acres were located north and east of the Los Penasquitos Lagoon. This portion of Appellant's property was when acquired and is still zoned in part "R-1-residential" and in part "A-1-agricultural." Under San Diego's zoning laws both classifications permit, as of right, single family homes, power plant substations, and other uses.[10] Appellant sold approximately 40 acres north of the lagoon and Carmel Valley Road for $1.7 million in 1979,[11] but still owns the remainder of this property.

The other 206 acres of Appellant's property, as noted, are within the Los Penasquitos Lagoon. At the time of Appellant's purchase, approximately 104 acres within the lagoon were zoned "M-1-A-industrial," which allows a variety of uses, including central electric plants and power substations.[12] Approximately 38 of these acres were rezoned "A-1-agricultural" in 1973, but the other 66 acres remain "M-1-A." The additional 102 acres within the lagoon have been zoned "A-1-agricultural" since before Appellant acquired the property, but the City has indicated that it would consider use of 50 of these acres for general industrial purposes. (App. Br. at 7). A map showing Appellant's property is reproduced on page 5.

It should be noted that the San Diego zoning laws specifically allow the Planning Commission to permit any structure or use by a public utility—including a power plant—*in any zone* by issuing a conditional use permit.[13] Thus, insofar as Appellant's use of its property for a power plant is concerned, the rezoning was of no significant effect. Both prior to and after the rezoning Appellant could

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[10] San Diego City Code § 101.0404.

[11] *See* Federal Energy Regulatory Commission, San Diego Gas & Electric Co., Uniform System of Accounts File, Part 1 (1-25-65 to present) (Sept. 4, 1979).

[12] San Diego City Code §§ 101.436-37.

[13] San Diego City Code § 101.0506.A.3.

erect a central electric plant as of right on a portion of the property (104 acres before and 66 acres after) but would require a conditional use permit from the Planning Commission for the remainder of its property. Moreover, under California law, as described below, the siting of power plants is subject to state control and the relevant state agency is empowered to override local zoning laws. Appellant never applied for any permit to construct a power plant on its property.

It is also noteworthy that Appellant's own witness testified that 79 of the lagoon acres subject to this lawsuit are sufficiently under water that any use would require three to four feet of fill, which would be economically infeasible and otherwise unrealistic. (T. 669-70).

4. *The San Diego "Open Space" plan.* In the mid-1960s and early 1970s the California state legislature responded to development pressures and environmental deterioration [14] by establishing a number of land use planning mech-

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[14] In the 1950s and early 1960s, California, which was then strongly growth oriented and placed very few restrictions on land developers, experienced a substantial population influx and, as a result, tremendous development pressures. Much of this development pressure was concentrated on its coastal areas. One-third of the land in the California coastal counties is publicly owned and uninhabited, yet 65% of the State's more than 20 million people reside in these 15 counties. Research Department, Security Pacific Bank, California Coastal Zone Economic Study: Profile 2-1, 3-1 (April, 1975). Developers built residential and industrial subdivisions on mountains, in canyons and dry river beds, in lagoons, and at other unsuitable localities. The environmental qualities which had originally attracted people to California suffered dramatically, and disasters requiring substantial federal and state emergency aid occurred in urban and suburban residential areas as homes were washed away by floods and landslides. Accounts of the most recent such events, which took place earlier this year in southern California, are contained in, *e.g.*, *Newsweek*, "A Plague of Rain and Mud," March 3, 1980, p. 33 ("Even before the storms subsided, critics began blaming Los Angeles public officials for allowing developers to build homes in the disaster-prone canyons and hills"); *Los Angeles Times*, Feb. 16, 1980, p. 1; *Los Angeles*

anisms. In 1971, the legislature enacted "open space" legistion requiring all California cities and counties to adopt "open space" plans and to enact "open space zoning ordinance[s]" consistent with these plans. Cal. Government Code §§ 65563, 65566, 65567, 65910.[15] It was the specific intention of the California legislature that cities and counties use their regulatory "open space" zoning powers in a manner which would not unreasonably burden privately-owned properties:

> "The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor." Cal. Government Code § 65912.

In response to the California "open space" legislation, in 1972 the City of San Diego began work on a Comprehensive Plan which was to include an "open space element." The first such plan was adopted by the San Diego City Council on June 19, 1973, and designated the 206 acres of Appellant's property in the Los Pennasquitos Lagoon as "open space." City of San Diego, City Council Resolution No. 208180.[16] However, the San Diego plans have indicated that

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Times, Feb. 18, 1980, p. 1, 3; *Los Angeles Times,* Feb. 19, 1980, pp. 3, 16. This unplanned California urban sprawl led to serious concern on the part of citizens and state agencies. *See, e.g., Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 120, 109 Cal. Rptr. 799, 805, 514 P.2d 111, 117 (1973).

[15] The California statutes required each city and county to adopt an interim "open space" plan not later than August 31, 1972 and a permanent "open space" plan not later than December 31, 1973. Cal. Government Code § 65563.

[16] During 1972 and 1973, the City of San Diego also considered acquiring Appellant's lagoon property and designated the parcel for purchase with funds from a bond issue which was ultimately rejected by the voters in September, 1973. Therefore, the City made no further attempts to purchase the property. (App. Br. at 6-8,

the characterization of Appellant's Los Penasquitos Lagoon property as "open space" was consistent with Appellant's proposed use of the property as a site for a power plant, as well as with a number of other uses which did not require destruction of the wetlands.

For example, the initial "open space" plan stated as follows:

> ". . . [T]he San Diego Gas and Electric Company has a large (240 acre) ownership [in the Los Penasquitos Lagoon] which it intends to utilize as the location of a nuclear power plant sometime in the 1980s. Again such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem . . . ." A Plan for the Preservation of Natural Parks for San Diego, City of San Diego General Plan, p. 24 (April, 1973).

This paragraph was repeated verbatim in the 1975 successor "open space" plan.[17]

Pursuant to California law, "open space" plans may be amended up to three times annually, and San Diego's plan has been amended numerous times at the instance of the City, community groups, and affected property owners.[18] Appellant never suggested that the "open space" plan be amended in any respect insofar as its lagoon property was concerned.

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10). As this Court held only recently in *Agins* v. *City of Tiburon*, 100 S. Ct. 2138, 2140 n.3 (1980), the City's aborted attempt to acquire the property raises no issue relevant to the consideration of the case presently before the Court.

[17] Torrey Pines Community Plan, p. 53 (1975). This plan, which applied only to the Torrey Pines area of San Diego, was adopted by the San Diego City Council on March 6, 1975. City of San Diego, City Council Resolution No. 212729.

[18] *See* Cal. Government Code §§ 65361, 65860; *see, e.g.*, City of San Diego, City Council Resolution No. 208179 (June 19, 1973), No. 212069 (Nov. 21, 1974), No. 213655 (June 26, 1975), No. 217247 (Dec. 8, 1976), No. 219722 (Nov. 22, 1977), and No. 221450 (July 25, 1978).

5. *Other regulations affecting Appellant's lagoon property.* Because 206 acres of Appellant's property are located in the Los Penasquitos Lagoon, filling of its property would be necessary before any development could be undertaken. (App. Br. at 5). Accordingly, Appellant's property is subject to state and federal regulatory agencies over which the City of San Diego has no control.

(a) *California Coastal Commission.* Since passage of the California Coastal Act in 1972, a permit from the California Coastal Commission has been required before any development can take place in environmentally sensitive areas such as the Los Penasquitos Lagoon. However, the Act specifically allows energy related facilities where there is no feasible less environmentally damaging alternative and reasonable measures are taken to mitigate adverse effects. *See* Cal. Public Resources Code §§ 30000, 30233. Appellant has never applied for any permit from the Coastal Commission to develop this property.

(b) *California Energy Conservation and Development Commission.* Since 1974 the siting of power plants in California has been subject to the preemptive jurisdiction of the California Energy Conservation and Development Commission ("Energy Commission"). The Commission makes the final determination as to the location of all power plants and is specifically authorized to override local zoning, open space, and other land use regulations. Cal. Public Resources Code § 25525. Accordingly, for land use regulation purposes the ultimate decision as to whether Appellant will be permitted to use its lagoon property for a power plant site (assuming that Appellant ever applies to do so) will rest with the Commission, not with the City of San Diego.

(c) *Federal programs.* Pursuant to Section 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344, a dredge and fill permit from the Corps of Engineers is necessary for development of Appellant's lagoon property. Appellant has never applied for any such permit.

6. *Proceedings below.* Appellant filed the present lawsuit on August 15, 1974, seeking as alternative remedies "inverse condemnation" damages and injunctive relief. (J.A. 4-15). However, Appellant pursued only the damage claim and the case was tried below by both sides solely as an "inverse condemnation" matter.[19] Perhaps for that reason, not all of the public record and judicially noticeable facts described above were brought to the trial judge's attention.

Specifically, Appellant did not disclose that it had included the 206 acres which it claimed had been "taken" in 1973 in its assets for rate base calculations, and hence was earning a state-guaranteed income on the property for the time during and after the supposed "taking" occurred. As noted, Appellant ultimately received some $1,483,140 as a return on the "taken" property. And although the trial judge was aware that only a part of Appellant's contiguous property was the subject of the suit, he never considered the impact of San Diego's regulations on Appellant's entire parcel. Thus, while Appellant did show that it had paid approximately $2 million dollars for the 206 lagoon acres in 1966 and that those 206 acres would be worth more if unrestricted industrial use were possible, the trial judge never evaluated the impact upon Appellant's contiguous acreage outside the lagoon. As mentioned above,

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[19] This case does not in fact involve "inverse condemnation" as that term has commonly been used. Thus, this Court has noted that "inverse condemnation" is simply a shorthand description for a money damage remedy to recover the value of property in circumstances which are the " 'inverse' or 'reverse' of a condemnation proceeding"—that is, where instead of exercising its condemnation powers, a government physically seizes or occupies property leaving it to the landowner to initiate proceedings. *United States* v. *Clarke*, 100 S. Ct. 1127 (1980). *See also* Nichols, *Eminent Domain* § 8.1[4][a] (rev. 3d ed. 1979). However, a consequence of trying the case on an "inverse condemnation" theory rather than as an overregulation by the police power was that Appellant secured not only damages, but also "severance damages" and attorney's fees. (J.A. 46).

Appellant sold approximately 40 of those acres for $1.7 million in 1979. Thus, it is now the case that between the proceeds of the sale and the amounts obtained from its rate base return, Appellant has received almost as much as it originally paid for the property and still has 372 acres, including 166 acres outside the lagoon.

In addition, the trial judge concluded that the City would in the future refuse to permit general industrial development in the lagoon and its floodplain, that this would preclude all reasonable future use of the Appellant's property, and that the City was therefore responsible for Appellant's damages, if any. In reaching this legal conclusion, the judge overlooked two major considerations. First, Appellant had purchased the property for use as a power plant, which is not precluded. Second, all uses in the lagoon are subject to approval by the California Coastal Commission and other regulatory agencies, and use of the site as a power plant is subject to the preemptive jurisdiction of the California Energy Commission, so that various state and federal agencies, not the City of San Diego, will make the final decision on permitted uses of Appellant's property.

Furthermore, although under California law the requirement of exhaustion of administrative remedies is jurisdictional and Appellant had never attempted any development or sought any permits, the trial judge excused Appellant on the ground that seeking a permit would be futile. (J.A. 42). In this respect the trial judge simply misunderstood the legal effect of the zoning and the "open space" plan because, as noted, they both specifically reserve the possibility of construction of a power plant. Moreover, as the Court of Appeal later pointed out, the trial judge also misunderstood the California law on exhaustion.[20]

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[20] California law requires as a jurisdictional matter that all administrative remedies be exhausted before resort is had to the courts. *South Coast Regional Commission* v. *Gordon*, 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977); *People* v. *Superior*

As a result of the trial proceedings, the trial judge erroneously concluded that a "taking" had been shown and awarded damages. (J.A. 41-43). The California Court of Appeal initially affirmed the lower court decision, holding that exhaustion was unnecessary, that Appellant had suffered a "taking," and that damages should be awarded. (J.A. 49-61).

However, after remand of the case by the California Supreme Court for reconsideration in light of its decision in *Agins* v. *City of Tiburon*, 24 Cal. 3d 266 (1979), 598 P.2d 25, 157 Cal. Rptr. 372, *aff'd*, 100 S. Ct. 2138 (1980), the California Court of Appeal reconsidered both aspects of its earlier opinion. In addition to applying the statements of the California Supreme Court in *Agins* that damages were not available under the circumstances, in its second opinion the Court of Appeal held that there were disputed facts on the "taking" issue not covered by the trial judge's opinion and that the record did not show that Appellant was entitled to proceed without exhausting its administra-

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Court, 91 Cal. App. 3d 95, 154 Cal. Rptr. 54 (1979); *Grant* v. *Superior Court*, 80 Cal. App. 3d 606, 145 Cal. Rptr. 699 (1978). An exception is permitted in rare cases where further resort to the administrative process would be futile. *Ogo Associates* v. *City of Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974) (where city passed ordinance specifically to preclude a particular project, owner not required to seek variance before suing). The trial judge seemed to think that because Appellant's property had been rezoned in part and placed in an "open space" category, the futility exception was met. The reasoning of the trial judge would do away with the exhaustion rule, because in virtually every litigated case some adverse action is taken by the governing body to precipitate the dispute. In fact, the present case is not within the futility exception because there was no specific prejudgment of Appellant's case. *Gantner & Mattern Co.* v. *California Employment Commission*, 17 Cal.2d 314, 318, 109 P.2d 932, 934 (1941); *People* v *Superior Court, supra*, 91 Cal. App. 3d at 102, 154 Cal. Rptr. 57 (1979) (futility exception applies only where the administrative agency "has declared [in advance] what its ruling will be in the particular case").

tive remedies. (J.A. 66).[21] The Court therefore reversed the trial judge's findings and judgment and sent the case back for further proceedings. This appeal followed.

SUMMARY OF ARGUMENT

1. *The California court was plainly correct in remanding Appellant's "taking" claim for further proceedings.* Faced with the record and judicially noticeable facts described above, the California Court of Appeal quite correctly found that the trial judge had not adequately dealt with a number of questions, both factual and legal, on the "taking" issue, and sent the case back for further proceedings.

First, under California law, exhaustion of administrative remedies is necessary before a landowner may file suit to challenge land use regulations. *South Coast Regional Commission* v. *Gordon,* 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977); *Metcalf* v. *Los Angeles County,* 24 Cal. 2d 267, 148 P.2d 645 (1944); *People* v. *Superior Court,* 91 Cal. App. 3d 95, 102-05, 154 Cal. Rptr. 54, 57-59 (1979). Indeed, this Court has recognized the same principle in *Agins* v. *City of Tiburon,* 100 S. Ct. 2138 (1980).

Second, the record in this case is simply incomplete. As pointed out previously, the trial judge failed to rule upon or consider a number of important factual and legal issues. This Court has repeatedly recognized that the kinds of factual infirmities found in the record by the California Court of Appeal make the present case inappropriate for review by this Court, at least at this stage. *See Moor* v. *Texas & N.O.R. Co.,* 297 U.S. 101, 105 (1936); *Mishkin* v. *New York,* 383 U.S. 502, 512-14 (1966).

2. *Appellant has not established a "taking" of its property.* The facts of Appellant's case, which have been discussed in detail previously, are important to the California

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[21] The Court specifically noted that Appellant "has not made application to use or improve the property nor has it asked City what development might be permitted." (J.A. 66).

court's disposition of the case. In brief, the critical facts are as follows:

—Appellant paid $3.5 million for a tract of 412 acres, of which the property involved in this litigation is a part. Appellant purchased the entire tract as a site for a future power plant, a use not precluded by either the zoning (which is largely unchanged from that in effect at the time of purchase) or the "open space" plan.

—Appellant included the entire tract in its rate base and, by operation of California utility law, has received an estimated return on its investment of $1,483,140. In addition, Appellant sold a 40-acre portion of the tract for $1.7 million. Thus, Appellant has now obtained in sales and rate of return revenues nearly all that it paid for the entire property, but still has 372 acres left, including 166 acres as to which Appellant has claimed no interference at all.

This Court has repeatedly held in police power regulation cases where no physical intrusion is involved that an unconstitutional burdening of property does not occur if the owner retains some reasonable use of the property so that it is not rendered valueless. *E.g., Andrus* v. *Allard*, 444 U.S. 51 (1979); *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n.8 (1976); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). Applying this principle and the specific tests set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124-28 (1978), it is plain that no "taking" has occurred. Appellant has not been precluded from its intended use of its property and, as noted, the property is far from valueless. Indeed, there has been no demonstrated substantial economic impact upon Appellant at all.

Moreover, Appellant has never attempted to develop the site for a power plant—supposedly its intended use of the property and, as noted, one permitted by the San Diego ordinances—or for anything else. This Court in *Agins* v. *City of Tiburon*, 100 S. Ct. 2138 (1980), made it clear that

a property owner is in no position to claim a "taking" unless either the ordinances on their face leave no reasonable use of the property or the property owner has attempted its development and been refused. 100 S. Ct. at 2142. This principle should apply with particular force in the present case where other state and federal agencies, not the City of San Diego, will make the final decision as to the use of Appellant's property.

ARGUMENT

I. THE CALIFORNIA COURT PROPERLY REMANDED THIS CASE TO THE TRIAL COURT AND REVIEW HERE IS NOT APPROPRIATE

Appellant's basic claim is that the trial court found as a factual matter that Appellant had been denied all reasonable use of its property. (App. Br. at 26-30). But, as discussed previously, while the trial judge did indeed enter findings of fact as cited by Appellant, the trial court's decision was reversed by the California Court of Appeal because there were disputed fact issues not dealt with by the trial court in its findings and conclusions and because the trial court was wrong in failing to require Appellant to exhaust its administrative remedies. (J.A. at 66). The Court of Appeal correctly remanded the case for further proceedings.

Under California law, exhaustion of administrative remedies is necessary before a landowner may file suit to challenge land use regulations. *South Coast Regional Commission* v. *Gordon,* 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977); *Metcalf* v. *County of Los Angeles,* 24 Cal.2d 267, 148 P.2d 645 (1944); *People* v. *Superior Court,* 91 Cal. Rptr. 54, 57-59 (1979). Indeed, this Court has recognized the same principle in *Agins* v. *City of Tiburon,* 100 S. Ct. 2138 (1980).

In addition, the record in this case is simply incomplete. As pointed out previously, the trial judge failed to

rule on or consider a number of important factual issues, and as a result the present record is riddled with factual infirmities. This Court has repeatedly held that it will not consider a case where "[t]he far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision." *Mishkin* v. *New York*, 383 U.S. 502, 512-14 (1966). *See Moor* v. *Texas & N.O.R. Co.*, 297 U.S. 101, 105 (1936).

The Amicus brief of the State of California deals with these issues in detail, and Amici respectfully refer the Court to that discussion.

II. APPELLANT HAS NOT DEMONSTRATED ANY UNCONSTITUTIONAL BURDENING OF ITS PROPERTY

The trial court's now reversed findings aside, the relevant evidence of record and information judicially noticeable in the California courts is as follows:

(a) In 1966 Appellant bought 412 acres of property in northern San Diego, including the 206 acres subject to this suit which are located in the Los Penasquitos Lagoon and are either under water or in a floodplain. At the time of the purchase, 104 of the acres in the lagoon were zoned for industrial use and 102 were zoned "agricultural," which allowed residential and agricultural uses as of right. In 1973, 38 of the industrial acres were rezoned agricultural; at the same time the Planning Commission indicated its willingness to consider general industrial uses on 50 of the "agriculturally" zoned acres. No other zoning changes have occurred. A power plant is an as of right use in industrial zones but not in agricultural zones. However, the Planning Commission may allow power plants in any zone. Thus, the rezoning had no significant effect on Appellant's ability to build a power plant.

(b) There was no "open space" plan in effect when Appellant bought its property, but a series of such plans have been adopted from time to time by the City of San

Diego, commencing in 1973. While these plans are not legally binding, they have specifically noted that the construction of a power plant on Appellant's property could be consistent with the "open space" designation. Thus, the "open space" plan had no significant legal or practical effect on Appellant's ability to build a power plant.

(c) At the time it purchased the 412 acres, Appellant notified the California Public Utilities Commission that it intended to use all of the property as a future power plant site and for that reason was including all of its costs for the acreage in its rate base. Appellant sought and obtained a guaranteed rate of return as a utility on its investment in all 412 acres, including the property subject to this litigation. The total estimated return received by Appellant was $1,483,140.

(d) In 1979, Appellant sold 40 of its 412 acres (not including any of the property subject to this litgation) for $1.7 million. Thus, between its sale of a portion of the property and allowed rate of return, Appellant has already received over $3.1 million on its $3.5 million investment. In addition, Appellant still has a total of 372 acres, including 166 acres outside the lagoon and not subject to the "open space" plan.

(e) Appellant's property, due to its location in the Los Penasquitos Lagoon, is subject to regulation by the California Coastal Commission and the U.S. Army Corps of Engineers. Moreover, the Energy Commission has preemptive authority as to the location of power plants, including the right to override local zoning controls. Thus, these agencies, not the City of San Diego, will make the final determination as to the use of Appellant's property.

There can be no doubt that, under these factual circumstances, the California court's holding that Appellant had not shown any unconstitutional burdening of its property by the City of San Diego was correct.

* * *

A. There Can Be No "Taking" Unless the Property Involved Is Left With No Reasonable Use

The common analysis of the "taking" issue apparently stems from Justice Holmes' comments in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 425 (1922), to the effect that:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . ."

See also to the same effect *Agins* v. *City of Tiburon, supra,* 100 S. Ct. at 2141-42 (1980); *Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 121-22; *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958).[22]

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[22] A strong argument can be made that all of these cases and the "taking" analysis they embody stem from a miscomprehension of Justice Holmes' comments. A careful reading of *Pennsylvania Coal,* together with Justice Holmes' earlier opinion in *Block* v. *Hirsch,* 256 U.S. 135, 156 (1921), makes it clear that Justice Holmes was analyzing a "taking" in terms of substantive due process, not in terms of the just compensation clause. Indeed, Justice Holmes later joined the Court's opinion in *Miller* v. *Schoene,* 276 U.S. 272 (1928), which cited with approval *Mugler* v. *Kansas,* 123 U.S. 623 (1887). *Miller* involved a "taking" claim by the owner of cedar trees which had been cut by the State of Virginia in order to prevent the spread of cedar rust to nearby apple orchards. *Mugler* involved a "taking" claim for a brewery the use of which had been prohibited when the Kansas Constitution was amended to include a temperance provision. In both cases, the Court analyzed the "taking" claims under the due process clause, not the just compensation clause and concluded that the regulations involved were constitutional and did not require compensation.

In recent years, a number of lower court decisions and commentators have cited *Miller* and *Mugler* with approval or otherwise followed their analysis in "taking" cases. E.g., *Pamel Corp.* v. *Puerto Rico Highway Authority,* 621 F.2d 33 (1st Cir. 1980); *Fred F. French Investing Co.* v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381; *appeal dismissed,* 429 U.S. 990 (1976); Girard, "Agins: A Step in the Right Direction," 31 Land Use Law and Zoning Digest 3 (1979); F. Bosselman, D. Callies,

The real question, then, is when does a regulatory scheme "go too far?" The rule has developed in this Court and elsewhere that a regulatory scheme pursuant to permissible police power objectives does not amount to a "taking" unless the owner is left with no reasonable use of his property so that the property is made valueless. *Andrus* v. *Allard,* 444 U.S. 51 (1979); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 355 (1908) (Holmes, J.); *Maher* v. *City of New Orleans,* 516 F.2d 1051, 1066 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976). *See also City of Eastlake* v. *Forest City Enterprises, Inc.,* 426 U.S. 668, 674 n.8 (1976) (no "taking" unless property is "render[ed] valueless").[23]

J. Banta, *The Taking Issue* (1973). These courts and commentators have pointed out that a due process analysis, which allows a balancing of the nature of the regulation involved against the burden imposed in determining whether a particular regulation is oppressive or arbitrary, is logically more consistent and leads to more coherent results than a "taking" analysis which focuses on the nature of the impact without considering the strength of the state interest. Although Amici believe that such an approach is in many ways superior to the usual "taking" analysis, as discussed below, Appellant's "taking" claims are insubstantial under any method of analysis.

[23] The principle cited here applies to cases of regulatory mechanisms which do not involve a physical invasion of property. Appellant contends that distinctions between physical seizures or occupations of land and so-called "takings" by overregulation are outmoded and "simplistic." It suggests that there are no analytical differences between the effect of a physical occupation of property by the government and regulation. (App. Br. at 19). But while it may be that a "taking" can occur without the transfer of physical control, *see Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 123 n.25 (1978), this Court has recently noted that "an actual physical invasion" is different for constitutional purposes from a regulatory devaluation of property. *Kaiser Aetna* v. *United States,* 444 U.S. 164, 180 (1979); *see also Andrus* v. *Allard,* 444 U.S. 51, 65 (1979); *Penn Central Transportation Co., supra,* 438 U.S. at 124. It has long been accepted, for example, that governmental occupation of even a small portion of a parcel of

Thus, a prohibition of the most profitable (the so-called "highest and best") use of a property or a diminution in its value as a result of a regulation does not amount to a "taking." For example, in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 384 (1926), this Court sustained as a reasonable exercise of police power not requiring compensation a zoning ordinance which reduced the plaintiff's property value by 75%. In *Hadacheck* v. *Sebastian, supra,* the Court approved a regulation which, without compensation, banned brickyards from a portion of Los Angeles, thus closing down plaintiff's long-existing brick factory and reducing his property's value by over 90%. And, in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 591 (1962), the Court approved an ordinance which prohibited the most beneficial use of the property without compensation. All of these cases were cited with approval in *Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 131. In sum, "[t]he cases are legion that sustained zoning against claims of serious economic damage." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring).

B. Appellant's Property Has Not Been "Taken"

In recent cases the Court has noted that it has had "considerable difficulty" developing any "set formula" to apply the principles discussed above in determining whether an owner has been denied "reasonable use" of his property by a regulation. *See Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 123-24; *see also Kaiser Aetna* v. *United States,* 444 U.S. 164, 174-75 (1979). Instead, the Court has developed several "tests" to be applied in

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real property is a compensable "taking," but a regulation which may have a similar economic effect does not require compensation. *Compare, e.g., United States* v. *Clarke,* 100 S. Ct. 1127 (1980) (construction of road over small portion of property is a "taking") *with Gorieb* v. *Fox,* 274 U.S. 603 (1927) (zoning regulation requiring a setback and thus precluding use of a portion of property does not require compensation).

determining whether a reasonable use remains. *See Penn Central, supra,* 438 U.S. at 124-25, 128. Applying these "tests" makes it plain that the California Court of Appeal was correct in concluding that Appellant has not shown that a "taking" has occurred:

(a) *Economic impact on the owner.*[24] As previously described, the 206 acres of property in the lagoon upon which Appellant's claim is based are part of a contiguous 412-acre tract which Appellant purchased for a single purpose. Amici submit that in order to prove a "taking," Appellant must show the economic impact of the regulations involved over its entire tract, not merely over a portion of its property. As this Court observed in *Penn Central*:

> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." 438 U.S. at 130-31.

Although in *Penn Central* the Court was referring specifically to air rights as opposed to a portion of a parcel's acreage, the analysis is identical. Indeed, as long ago as *Gorieb* v. *Fox,* 274 U.S. 603, 608 (1927), which sustained a mandatory setback law against a claim that the effect of the law was to take the portion of the property from the street line to the setback, the Court considered the property as a whole in an analysis of the impact of the regulations.[25]

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[24] *See* 438 U.S. at 124.

[25] Similarly, in *Pruneyard Shopping Center* v. *Robins,* 100 S. Ct. 2035 (1980), Justice Rehnquist for the Court noted that deciding a "taking" claim requires analysis of the overall impact of the restriction. The Court there held that entirely depriving an owner of a shopping center of the right to exclude others—"one of the essential sticks in the bundle of property rights"—did not constitute a "taking." It is significant that the first opinion of the

Appellant never attempted to show the impact of the regulations on its entire property.

And in any case, it is quite clear that there is no constitutionally significant economic impact on Appellant from the City's actions. Appellant is not precluded from using its property for the purpose for which it was purchased and has already recovered almost the entire purchase price. Thus, whatever the effect of any preclusion of general industrial development might have been on some other owner, there plainly was no effect on Appellant or, for that matter, even on Appellant's "investment-backed expectations." [26]

Indeed, Amici believe that this case may well not have been pursued this far were it not for the confusion resulting from the suggestion by this Court in *Penn Central, supra,* 438 U.S. at 124, that an owner's "investment-backed expectations" (as opposed to the actual impact of a regulation) are relevant to a "taking" analysis. Amici understand that in *Penn Central* itself this Court explicitly rejected the notion that a "taking" could be shown whenever a regulation limited an owner's ability to exploit a property interest he had believed was available for development. 438 U.S. at 130. Similarly, in *Andrus* v. *Allard, supra,* 444 U.S. at 65-66, this Court noted that "loss of future profits" and other such "investment-backed expectations" is "less compelling than [loss of] other property-related interests" and, hence, not entitled to significant weight.

California Court of Appeal in the instant case antedated this Court's *Penn Central* opinion and therefore did not consider this Court's holding that a "taking" analysis should consider an *entire* parcel, not a pre-selected portion.

[26] A substantial argument can be made that the "investment-backed expectations" of a governmentally regulated public utility such as Appellant are necessarily limited to regulated uses and are therefore significantly different from those of other property owners. This principle has been explicitly recognized in *Bridgeport Hydraulic Co.* v. *Council on Water Company Lands,* 453 F.Supp. 942 (D. Conn. 1978), *aff'd,* 439 U.S. 999 (1978).

The Appellant's argument here is a prime example of how landowners and developers have seized upon the phrase "investment-backed expectations" in an attempt to elevate their speculative investments and ventures to constitutionally protected "vested rights." Thus in its brief Appellant argues that simply because it spent money to buy property for a use allowed under the zoning in effect at the time of acquisition, its "investment-backed expectations" are such that "the government should not be allowed to frustrate those expectancies without paying compensation." (App. Br. at 25). In effect, Appellant argues that its purchase of property gives rise without any further action to a "vested right" to continuation of the property's pre-existing zoning and a "vested right" that the value of its property will go up, not down. *See* J.A. 69, testimony of F.W. Devore, Appellant's Manager of Engineering Land Department.

The truth of the matter is that many decisions from this Court and other courts hold that there is no such thing as a "vested right," whether "investment-backed" or otherwise, in the continuance of a particular zoning classification or even a particular type of land use. Thus, as long ago as *Mugler* v. *Kansas,* 123 U.S. 623 (1887), in rejecting a "taking" claim where an amendment to the Kansas Constitution prohibiting breweries precluded the long-standing use of Appellant's property, this Court observed:

> It is true, that, when the defendants in these cases purchased or erected their breweries [their use was lawful]. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. 123 U.S. at 669.

See also to the same effect *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962) (property owner had no "vested right" in continuing long-standing use of the property as a quarry); *Louisville Bridge Co.* v. *United States,* 242 U.S. 409 (1917) (law authorizing private bridge across Ohio River did not create a "vested right" requiring payment of

compensation under Fifth Amendment when Congress later amended statute to require rebuilding of bridge); *Hadacheck* v. *Sebastian, supra,* 239 U.S. at 410 (brickyard owner had no "vested right" in continued use of property as brickyard).

In every one of those cases, the owner's "investment-backed expectations" were to continue using his property as he had been using it. Obviously Goldblatt did not invest in his quarry, or the Louisville Bridge Company in its bridge, or Hadacheck in his brickyard, or Mugler in his brewery, with the expectation that continued use would be precluded. But as the Court made clear in all those cases, the overall impact of the regulation was not such as to render them unconstitutional. Thus, those decisions paid no attention to "investment-backed expectations."

Indeed, the very nature of zoning and other land use planning is such that it can always be expected that such regulations will not be permanent, but rather will change from time to time. This Court long ago recognized as much in *Village of Euclid* v. *Ambler, supra,* 272 U.S. at 386-87 (1926), when it observed that the changing nature of urban life "will continue to require . . . additional restrictions in respect of the use and occupation of private lands in urban communities." [27]

Of course, Amici recognize that in certain cases a change in a land use regulation may have such a burdensome impact that the change amounts to a "taking," but that is not because of any "vested right" or "investment-backed expectations" but because of the actual impact. Thus, while it is

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[27] *See* generally, 2 Rathkopf, *The Law of Zoning & Planning,* Chapter 57 (6th ed. 1966); 4 Williams, *American Land Planning Law,* Chapter 111 (1975). As stated in *A Model Land Development Code,* the accepted rule is that an "expectation that a development permit could be obtained does not create any rights that prevent change of a development ordinance." American Law Institute, *A Model Land Development Code: Complete Text & Reporter's Commentary,* § 2-309 (2) (1975).

clear in the present case that there is no significant economic impact upon Appellant under any standard, it is equally clear that the occasional use of the term "investment-backed expectations" in this Court's consideration of "taking" questions is not helpful and should be explicitly abandoned.

(b) *A state tribunal's reasonable conclusion that police power objectives of health, safety, morals or general welfare would be promoted by the contemplated regulation.*[28] There can be no doubt on this point. The San Diego ordinances limit the use of the Appellant's lagoon property to the construction of a power plant and other low-density uses. It is beyond dispute that substantial limitations on the usage of property located underwater or in a floodplain are proper. See the discussion in 2 *Williams, American Land Planning Law,* Chapters 38-39 (1975). Indeed, the entire federal flood insurance program in this country is based on the notion that high-density residential and industrial uses should be avoided in floodplains.[29] And this Court has already held that the State of California's "open space" legislation is legitimate. *Agins* v. *City of Tiburon, supra,* 100 S. Ct. at 2141-42.

(c) *Character of the governmental action.*[30] Appellant characterizes the action of the City of San Diego as "extinguish[ing] a fundamental attribute of ownership," the supposed "right to develop," on the theory that "extinguishing" one attribute of ownership amounts to a "taking." (App. Br. at 24). But as this Court made clear in *Pruneyard Shopping Center* v. *Robins,* 100 S. Ct. 2035 (1980), it is the overall impact, not the "extinguishing" of some portion of ownership rights, which must be examined. Thus, in *Pruneyard* the state had totally "extin-

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[28] *See* 438 U.S. at 125.

[29] 42 U.S.C. §§ 4001(e) *et seq. See also Texas Landowners Rights Ass'n* v. *Director, FEMA,* 453 F. Supp. 1025 (D.D.C. 1978), *aff'd mem.,* 598 F.2d 311 (D.C. Cir.), *cert. denied,* 100 S. Ct. 267 (1979).

[30] *See* 438 U.S. at 124, 128.

guished" the owner's right to exclude leafletters from its property, but this Court found no "taking."

Actually, in this portion of the argument Appellant is seeking to bring itself into line with cases such as *Kaiser Aetna* v. *United States, supra,* where the government was physically invading the private property involved.[31] No such thing has taken place in the present case. The City of San Diego has not turned the Appellant's property into a park; it has not required public access; it has not precluded the Appellant from building its power plant on the property. It has passed what is neither more nor less than a zoning regulation which has taken due account of the nature of the property involved and the Appellant's intended use.

* * *

Finally, it is worth noting that this case is similar in significant respects to *Agins* v. *City of Tiburon, supra.* There, as here, the "open space" plan and zoning on its face allowed the owners to develop the property as they claimed was desired. There, as here, the owners made no attempt to actually develop the property—they never sought a building permit, never submitted any plans. This Court in *Agins* concluded that the owners were, therefore, in no position to attack the zoning as applied. 100 S. Ct. at 2142. The same result is required here.[32]

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[31] In *Kaiser Aetna,* this Court held the government's attempt to require the property owner to allow public access to its private pond to be a "taking." *But see Pruneyard Shopping Center* v. *Robins, supra.*

[32] Appellant argues at length that the trial court and the Court of Appeal in its first opinion concluded that exhaustion of administrative remedies was unnecessary and that, therefore, failure to exhaust its administrative remedies is not an adequate state ground of decision. (App. Br. at 30-35). This argument overlooks several important facts. First, the original Court of Appeal opinion has "become a nullity and [is] of no force or effect" because of subsequent actions by the California Supreme Court. *Knouse* v. *Nimocks,* 8 Cal.2d 482, 66 P.2d 438 (1937). *See People* v. *Woods,* 19 Cal. App. 556, 65 P.2d 940 (1937). Second, the Court of Appeal in its

CONCLUSION

Amici submit that Appellant has fallen far short of showing a constitutional violation. Indeed, Amici believe that it is evident that, on the present record, Appellant raises no colorable "taking" claim.[33] Amici believe, therefore, that the holding of the California Court of Appeal is correct and should be affirmed.

Respectfully submitted,

DAVID BONDERMAN
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

CHRISTOPHER J. DUERKSEN
THE CONSERVATION FOUNDATION
1717 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae

Of Counsel:

MICHAEL MANTELL
Washington, D.C.

ANTONIO ROSSMANN
San Francisco, Calif.

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later opinion overturned both the trial court's and its first opinion, which is also of no further effect. Third, the argument is based on the mistaken premise that the zoning and "open space" plan preclude all industrial uses when, as discussed previously, they do not preclude a power plant. Fourth, the point is not whether failure to exhaust is an adequate state ground. Rather, as this Court held in *Agins*, a property owner cannot claim a "taking" under the U.S. Constitution unless, at a minimum, he has been damaged in fact. Where the ordinance involved on its face allows appropriate uses, there can be no such damage in the absence of a frustrated attempt at development.

[33] In the event that this Court does reach the remedy issue, Amici submit that, as the California courts have concluded, no damage remedy is appropriate. Amici fully support the position on this issue set forth by Amici Curiae National Trust for Historic Preservation, *et al.* in their brief.

APPENDIX

APPENDIX A

The interests of Amici are as follows:

1. The Conservation Foundation is a nonprofit research and communications organization based in Washington, D.C. The Foundation's primary purposes are to improve the quality of the environment and to promote wise use of the Earth's resources. Since its founding in 1948, The Conservation Foundation has worked extensively in the fields of land use planning, urban conservation, coastal resources protection and public land management.

2. Don't Tear It Down is a nonprofit membership organization in Washington, D.C. dedicated to preserving those features of the built environment which have made the capital one of the most beautiful urban areas in the world and a pleasant city in which to live and work. Don't Tear It Down has played a central role in preserving and revitalizing the Old Post Office, the Willard Hotel, Lansburgh's, and other well-known Washington landmarks, and in encouraging continued use and adaptive reuse of older buildings and structures.

3. The National Audubon Society ("NAS") is a nationwide membership organization with 439 chapters and 400,000 members. NAS' goals include working for policies that encourage environmentally and economically sound land and water resource planning at the national, state, and local levels and promoting environmentally sensitive development and rehabilitation in our cities.

4. The National Center for Preservation Law was incorporated in 1978 under the laws of the State of New York as a nonprofit organization devoted to architectural, historic, and neighborhood conservation. The Center maintains offices in New York and Washington and devotes its resources to advising and providing legal services for interested state, local and private agencies and groups with respect to conservation of historic resources.

5. The National Conference of State Historic Preservation Officers is a nonprofit organization which facilitates the administration of state and federal programs for the preservation of America's historic, architectural and cultural heritage. The National Conference membership consists of the officially designated State Historic Preservation Officer in each of the 50 states, the District of Columbia and five territories. Among the responsibilities of these officers are the compilation of statewide surveys of historic resources; nominations of inventoried properties to the National Register of Historic Places; and the administration of the National Historic Preservation Act grants-in-aid program.

6. The Sierra Club is a nonprofit membership organization which has been extensively involved at both local and national levels in matters pertaining to land use. The Sierra Club, through its nearly 200,000 members, has a long-standing interest in ensuring that zoning regulation is an instrument of rational land use planning sensitive to evironmental concerns.